

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RONALD E. MELHORN,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	No. 98-CV-6687
NEW JERSEY TRANSIT RAIL	:	
OPERATIONS, INC.,	:	
Defendant.	:	

MEMORANDUM

GREEN, S.J.

June , 2001

Presently before the court is Defendant's Motion to Compel Plaintiff's Independent Medical Examination and Plaintiff's Response. For the reasons set fourth below, Defendant's motion will be denied.

I. FACTUAL AND PROCEDURAL HISTORY

On or about August 28, 1998, Plaintiff Ronald E. Melhorn allegedly suffered injuries during the course and scope of his employment as a locomotive engineer with Defendant New Jersey Rail Operations, Inc. (See Compl. ¶ 5.) On October 5, 1998, Dr. Gary S. Alweiss ("Dr. Alweiss"), a neurologist, examined Plaintiff on behalf of Defendant. (See Pl.'s Ex. B at 1.) Dr. Alweiss concluded that Plaintiff suffered soft tissue injuries and likely suffered a cervical sprain/strain, but no permanent neurological dysfunction at the time of the accident. (See Pl.'s Ex. B at 4.) With respect to Plaintiff's complaint of shoulder pain, Dr. Alweiss stated that, "it would be appropriate to refer Plaintiff for orthopaedic evaluation for the alleged pain-limited motion of his right shoulder." (Pl.'s Ex. B at 4.)

On December 24, 1998, Plaintiff instituted an action against Defendant under the Federal Employers' Liability Act, 45 U.S.C. §§ 51, et seq. (FELA); Federal Safety Appliance Act, 45

U.S.C.A. §§1, et seq., recodified in 49 U.S.C.A. § 20301, et al. On February 2, 1999, Dr. David Greifinger ("Dr. Greifinger"), an orthopaedist, examined Plaintiff as per Dr. Alweiss' recommendation. (See Pl.'s Resp. Ex. B at 4.) Dr. Greifinger referred Plaintiff to Dr. Cubelli for surgical treatment of Plaintiff's right shoulder. (See Pl.'s Resp. Ex. C. at 1.) On September 14, 1999, Plaintiff underwent an open decompression procedure of his right shoulder. (See Pl.'s Resp. Ex. C at 1.) Plaintiff returned to Dr. Greifinger on November 17, 1999 for a follow-up evaluation. (See Pl.'s Resp. Ex. C at 1.) During the evaluation, Plaintiff told Dr. Greifinger that his symptoms of shoulder pain did not improve following the surgery. (See Pl.'s Resp. Ex. C at 1.) Dr. Greifinger concluded that "the chances for improvement in this patient, under this setting, is remote." (See Pl.'s Resp. Ex. C at 6.)

On October 27, 2000, Defendant scheduled two medical examinations for Plaintiff with Drs. Alweiss and Greifinger. (See Def. Mot. to Compel ¶ 2.) Plaintiff declined to be re-examined by either doctor. (See Def. Mot. to Compel at ¶ 3.) On November 6, 2000, Defendant filed a Motion to Compel Plaintiff to Appear for Independent Medical Examinations. (See Doc. No. 16.) Defendant's Motion to Compel was denied for failure to show good cause for subjecting Plaintiff to further medical examinations. (See Order, April 5, 2001.) Defendant now files a Motion to Compel Plaintiff to undergo a post-operative examination by Dr. Alweiss. Plaintiff filed a Response.

II. DISCUSSION

Fed. R. Civ. P. 35(a) states that:

When the mental or physical condition ...of a party...is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner... The order may be made only on motion for

good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examinations and the person by whom it is to be made.

In the present matter, Defendant moves to compel Plaintiff's independent examination by Dr. Alweiss. Defendant contends that Plaintiff's shoulder surgery significantly altered the status of Plaintiff's alleged injury and thus, requires an independent neurological examination by Dr. Alweiss. Plaintiff opposes Defendant's motion on procedural and substantive grounds. Procedurally, Plaintiff argues that Defendant's motion should be denied as untimely, because the discovery deadline was December 29, 2000. Substantively, Plaintiff argues that he already received a post-operative examination by Dr. Greifinger and should not be subject to another post-operative examination.¹ Plaintiff rejects Defendant's argument that the surgery provides the change in circumstances necessary for a second independent medical examination. Plaintiff asserts that the purpose of the shoulder surgery was to alleviate the pain that Plaintiff was having in his shoulder. (See Pl.'s Resp. Ex. C at 1.) Plaintiff relies on Dr. Greifinger's post-operative report which states that the surgery improved crepitation, but did not improve or worsen Plaintiff's symptoms of pain. (See Pl.'s Resp. Ex. C at 5.)

Upon review of the instant motion and the response thereto, I conclude that Defendant has failed to demonstrate good cause for subjecting Plaintiff to a post-operative examination by Dr. Alweiss. Approximately two months after Plaintiff's shoulder surgery, Plaintiff was subjected to a post-operative examination by Dr. Greifinger, on behalf of Defendant. (See Pl.'s

¹Moreover, Plaintiff argues that his shoulder injury is not in Dr. Alweiss' field of expertise. Plaintiff finds it significant that Dr. Alweiss did not treat Plaintiff in response to Plaintiff's complaints of shoulder pain, but instead referred Plaintiff to an orthopedist. (See Pl.'s Resp. Ex. B at 4.)

Resp. Ex. C at 1.) There is no evidence in the record that Dr. Greifinger was unqualified to adequately examine Plaintiff's shoulder.² Furthermore, there is no evidence in Dr. Greifinger's report that would lead me to the conclusion that Plaintiff's shoulder surgery significantly altered Plaintiff's condition as to require an independent post-operative neurological exam, in addition to Plaintiff's post-operative orthopaedic exam. Accordingly, Defendant's Motion to Compel Plaintiff's Independent Medical Examination will be denied.

An appropriate order follows.

²Rather, Dr. Alweiss referred Plaintiff to Dr. Greifinger for an examination of Plaintiff's shoulder. Dr. Alweiss' report states: "Mr. Melhorn does complain of significant shoulder pain and tenderness. It may be appropriate to refer him for orthopedic evaluation as well for his complaints of pain-limited motion of the right shoulder." (Pl.'s Resp. Ex. B at 4.)

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OPERATIONS, INC.,	:	
Defendant.	:	

ORDER

AND NOW, this day of June, 2001, upon consideration of Defendant New Jersey Transit Rail Operations Inc.'s Motion to Compel Plaintiff's Medical Examination and Plaintiff's Response, **IT IS HEREBY ORDERED** that Defendant's Motion to Compel is **DENIED**.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J